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A football agent's contractual remuneration

Posted on [July 11, 2013](#) by [mhogg](#)

Football agents expect to get paid for their services in finding new contracts of employment for their principals, their footballers. So what is to happen if an agent with an exclusive right to conclude transfer deals on behalf of a player is sidelined by the player, who breaks his agreement with the agent by using another agent, thereby causing the agent to lose out on an expected transfer fee? One would expect, in the usual case, that the agent would receive damages calculated according to an agreed rate of remuneration for negotiating such transfers. But matters are complicated if the contract between agent and player does not provide for any particular rate of remuneration for the agent: how does one calculate a 'lost fee' in such a case?

That question is one of the problems affecting current litigation between a football agent, Mark Donaghy, and a player, David Goodwillie. An initial judgment as to the relevancy of this action, handed down by Lord Stewart in the Outer House on 10th July 2013, may be accessed [here](#)). The very terse agreement entered into between agent and player in this case (signed by the footballer at a Burger King Fast Food restaurant, we are told), stated simply that:

"I David Goodwillie born 28-03-89 hereby authorise Licensed Players' Agent Mark Donaghy to act exclusively on my behalf as my Lawful Agent and Representative to negotiate in my name all conditions with my current club Dundee United FC and future transfer to any other club. This agreement will commence on 29th of March 2011 and end on 01st September 2011."

The absence of any express right to remuneration on the part of the agent in this agreement is noticeable. Contracts can, of course, be gratuitous under Scots law, but football agents do not intend to provide their services for nothing so this is clearly not a case of a contract intended by the parties to be gratuitous. In onerous contracts for the provision of services, one would expect to see the basis of remuneration stated by the parties. Where it is not, some agents benefit from regulatory protection (see The Commercial Agents (Council Directive) Regulations 1993), but those are agents who negotiate sales of goods contracts not contracts for the provision of footballers' services. In the absence of a statutory mechanism for importing a price into a contract, one has to turn to the common law. The obvious common law analysis might be to refer to a common rate applicable within the specific market, but Lord Stewart was not favourable to such an approach.

His Lordship's view of the matter of the remuneration due to the agent is given at paragraph 18 of his judgment. He begins by remarking:

"Unquestionably in my opinion the written "Agreement" is an exclusive "mandate" for the stated agency activities."

This is, with respect, perhaps not the most helpful way in which to begin discussion of the issue, as 'mandate' is a form of gratuitous agency, so clearly not relevant to a case where work undertaken by the agent is intended to be entirely gratuitous. Passing over this infelicity, Lord Stewart continues:

"The first issue here is about the consequence – as a matter of legal principle and apart from the regulatory framework – of the non-inclusion of a term as to remuneration where the agent's commission is to be paid, not by the principal, but by a third party. Counsel did not address me on this point. In the absence of any submissions to

the contrary, given the averment that the defender was content with the arrangement and given also that the practice is said to be commonplace in the industry, I believe I must hold that the contract is, on the pleadings, prima facie enforceable between the parties as it stands without a remuneration clause. There is no suggestion by the defender that such a payment would have been an undisclosed “secret commission” for which the agent would be bound to account. The impression that I have formed is that some services were meant to be provided gratuitously on the understanding that the pursuer would in due course make a profit from the expected transfer. I asked senior counsel for the defender what would have been the measure of remuneration, if the pursuer had actually negotiated the transfer acting under the mandate. Senior counsel suggested quantum lucratus or quantum meruit. I do not think this is correct: the remuneration would have been, on the pleadings, whatever commission the pursuer could have negotiated with Blackburn Rovers [Great Western Insurance Co v Cunliffe (1873-74) LR 9 Ch App 525].”

The final sentence here is worth dwelling over. When asked for an answer, counsel for the agent ventured to suggest that the level of remuneration would be quantum lucratus (unlikely, as this is the measure used in unjustified enrichment and not contract cases) or else quantum meruit. The latter was a more sensible suggestion (especially given that it matched the pursuer's pleadings, which sought a “reasonable remuneration” for the provision of the agent's services), and indeed has been applied by the courts in previous cases where contracts for the provision of services have been agreed without specification of the rate of remuneration. One relatively recent example is that of *Avintair Ltd v Ryder Airline Services* 1994 SC 270, which concerned an agent's brokering of an airline services contract. The Inner House in that case favoured an award to the agent based upon a quantum meruit basis. The case is not quite in point, as in *Avintair* the agent in fact provided the services, whereas in the case before Lord Stewart the agent was prevented from so doing by breach on the footballer's part. That difference, one would have thought however, would not affect the issue of the appropriate measure of remuneration. The Court in *Avintair* noted that a quantum meruit is usually calculated “by the ordinary or market rate” for the services, though noted that another reasonable method may be adopted where there is no ordinary or market rate. One might have thought that this market rate approach would have commended itself to Lord Stewart, but, as the above quotation shows, he did not favour it: he preferred, as the appropriate measure, “whatever commission the pursuer could have negotiated” with the specific club to which the player transferred. This is, in one sense, a vaguer standard than the market rate, as, without evidence being presented by Blackburn Rovers as to what amount they would have paid the agent, we cannot know what the agent's remuneration would have been in the absence of breach; but, in another sense it is much more specific, as it demands investigation into specific counterfactual negotiations between specific parties rather than a reference to market rates.

Whether or not Lord Stewart was right to take the view he did, in the case to which his Lordship refers in support of his view, the English Court of Appeal judgment in *Great Western Insurance Co v Cunliffe*, the court did not appear to regard the matter of the agent's remuneration as an entirely subjective exercise; on the contrary, in the judgment of James LJ it is clear that customary rates are the favoured basis of the remuneration applied by the court:

“Whether you call him a broker or not, the person who is the agent for the merchant or anybody else, by a well-established practice obtains the insurances, and receives a discount of 5 per cent., which he puts into his own pocket. He is paid by the underwriter instead of by his principal. And then, by a practice quite as well known, recognised by everybody connected with the business, recognised by the Courts of Law of this country, referred to over and over again, there is another thing – there is a gratuity which the broker receives upon the settlement of the accounts, being 12 per cent. upon the balance, if the balance should happen to be a favourable one, that is, if the underwriter finds it to be a profitable account he gives 12 per cent. upon it to the broker who brought the business to him.”

This description could be said to equate to a quantum meruit, describing as it does the standard rates applicable

in the specific insurance market at issue in the case. The point is reinforced in the same case in the judgment of Mellish LJ, who states:

“If a person employs another, who he knows carries on a large business, to do certain work for him, as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other persons – which is very common in mercantile business – and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging.”

The references to ‘ordinary amount’ and ‘habit of charging’ again suggest an objective evaluation of a market practice.

The Goodwillie litigation continues (Lord Stewart having allowed a proof before answer) and the final determination of what may be due to the agent has thus yet to be made, but it will be interesting to see how the court eventually thinks that the appropriate level of remuneration in agency contracts of this sort should be determined: by reference to the market rate that the agent might have commanded (a reasonably objective standard), or by reference to the sum which the agent could have got in negotiation with Blackburn Rovers (a more subjective standard, which will require, one would imagine, evidence from Blackburn Rovers as to what they might have paid by way of commission).

** It should be added that the litigation has also raised another issue relating to the agent's remuneration, that being whether provisions in the Scottish Football Association's Regulations concerning agents' remuneration were Incorporated into the parties' contract or not – again, this is a matter for the proof before answer.

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One Response to *A football agent's contractual remuneration*



Elliott says:

July 30, 2014 at 11:25 am

As a Blackburn fan, I must say this made for a great read. Thanks for sharing.

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